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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2018 TMOB 96

Date of Decision: 2018-08-29

IN THE MATTER OF AN OPPOSITION

**911979 Alberta Ltd and Shoppers Drug
Mart Inc.**

Opponent

and

AKM Hai

Applicant

1,677,740 for Momalife

Application

INTRODUCTION

[1] AKM Hai (the Applicant) has applied to register the trade-mark Momalife (the Mark) in association with the following Goods:

Nutritional pharmaceuticals, herbal medicine and phyto-drugs for maintaining good cellular health, slowing down the aging process, providing vital energy for growth, anti-aging, cardiovascular health and the prevention of cancer, namely, promoting cellular growth, enhancing the immunity system, helping to lower low-density lipoprotein (LDL) cholesterol and raise high-density lipoprotein (HDL) cholesterol, promoting healthy blood sugar, controlling blood sugar for pre-diabetes, improving and maintaining kidney and liver health, improving sexual desire and enhancing the libido, preventing cardiovascular disease, maintaining cellular health, lipid lowering agents, agents for the prevention of colon, breast and prostate cancer; and nutraceuticals, cosmeceuticals, herbal medicines and phyto-drugs as gels, ointments and creams for the skin health, namely, for the treatment of skin conditions, namely dermatitis, eczema, psoriasis and for the treatment of acne.

[2] 911979 Alberta Ltd. and Shoppers Drug Mart Inc. (collectively, the Opponent) opposes the application on several grounds, including on the basis that the Mark is confusing with its LIFE family of trade-marks (set out in the attached Schedule A) which the Opponent alleges had been previously used in Canada in association with a wide range of goods and services, including nutritional pharmaceuticals, herbal medicines, nutritional supplements and personal care products.

[3] For the reasons that follow, the opposition is rejected.

THE RECORD

[4] On May 20, 2014, the Applicant filed application No. 1,677,740 on the basis of proposed use in Canada. The application was advertised for opposition purposes in the *Trade-marks Journal* on October 28, 2015.

[5] On March 29, 2016, the Opponent opposed the application. The grounds of opposition may be summarized as follows:

- (a) The application does not comply with paragraphs 38(2)(a) and 30(e) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) because as of the filing date of the application, namely May 20, 2014, neither the Applicant nor its named predecessors in title intended by itself or through a licensee to use the Mark in Canada in association with the goods described in the advertised application.
- (b) The application does not comply with paragraphs 38(2)(a) and 30(i) of the Act because the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the applied-for goods in view of the prior adoption, use, making known and advertisement of the Opponent's marks and family of marks and sections 19, 20 and 22 of the Act. In particular, use of the Mark will infringe the Opponent's exclusive rights in its LIFE family of trademarks contrary to section 19 of the Act, will be deemed to infringe the Opponent's exclusive rights in such marks contrary to section 20 of the Act, and will depreciate the value of the goodwill existing in the Opponent's LIFE family of trade-marks contrary to section 22.

- (c) The application does not comply with paragraphs 38(2)(b) and 12(1)(d) of the Act, because as of the filing date of the application, namely May 20, 2014, the Mark was and is confusing with the Opponent's LIFE registered trade-marks and LIFE family of trade-marks. The use of the Mark and the Opponent's trademarks and family of trademarks in the same area would be likely to lead to the inference that the goods and services associated with such trademarks are manufactured or sold by the same person. As a result, the Mark is not registrable.
 - (d) The Applicant is not the person entitled to registration of the Mark pursuant to sections 38(2)(c) and 16(3)(a) of the Act, because as of the filing date of the application, the Mark was and is confusing with the Opponent's LIFE family of trademarks, which had been previously used or made known in Canada by the Opponent and/or the Opponent's licensees.
 - (e) Pursuant to sections 38(2)(d) and 2 of the Act, the Mark is not distinctive in that it does not actually distinguish the goods in association with which it is proposed to be used by the Applicant from the goods or services of the Opponent, and it is not adapted to distinguish the goods, in view of the Opponent's LIFE family of trademarks.
- [6] In an 11-page counter statement filed June 8, 2016, the Applicant essentially denied each of the grounds of opposition.
- [7] As its section 41 evidence, the Opponent filed the affidavit of Pat Dean, sworn October 5, 2016.
- [8] As its section 42 evidence, the Applicant filed his own affidavit, sworn January 26, 2017.
- [9] The Opponent filed no reply evidence and neither Mr. Dean nor Mr. Hai was cross-examined. Only the Applicant filed written arguments; an oral hearing was not requested.

ONUS

[10] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, the Opponent must first adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155 (FCA)].

MATERIAL DATES

[11] The material dates that apply to the grounds of opposition are as follows:

- section 38(2)(a) with respect to non-compliance with section 30 – the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- sections 38(2)(b) and 12(1)(d) with respect to confusion with a registered trademark – the date of this decision [*Park Avenue Furniture Corp v Wickers/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)];
- sections 38(2)(c) and 16(3)(a) with respect to entitlement – the filing date of the application [section 16(3)(a) of the Act]; and
- sections 38(2)(d) and 2 with respect to distinctiveness – the filing date of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 2004 FC 1185, 34 CPR (4th) 317].

THE EVIDENCE

Opponent's Evidence – Affidavit of Pat Dean

[12] In his affidavit, Mr. Dean identifies himself as a Senior Vice President of Shoppers Drug Mart Inc. (Shoppers). Mr. Dean explains that 911979 is the owner of a large family of trademarks and registrations and applications for the word LIFE or comprising the word LIFE (which

he refers to collectively as the “LIFE trade-marks”). Shoppers is licensed by 911979 to use the LIFE trade-marks and pursuant to the license, 911979 exercises direct control over the character and quality of the goods and services in association with which the LIFE trade-marks are used. In addition, as of March 28, 2014, Shoppers has also sublicensed Loblaw Inc. (Loblaw) and its affiliated companies the right to use certain LIFE trade-marks, and 911979 exercises direct control over the quality and character of the goods and services in association with which the LIFE trade-marks are used pursuant to that sublicense.

[13] Mr. Dean then states that, since 1956, the Opponent and its predecessors-in-title have operated or provided franchising services in respect of the operation of drug stores in Canada. These drug stores operate under the name “Pharmaprix” in Quebec and “Shoppers Drug Mart” elsewhere in Canada. As part of its operations, the Opponent designs, markets and sells a wide variety of goods under its LIFE family of trade-marks. These goods and services are provided at, or through, the Opponent’s Shoppers Drug Mart stores as well as many Loblaw stores.

[14] At paragraph 6 of his affidavit, Mr. Dean attests that the Opponent uses its LIFE trade-marks in association with over 2,000 different products. He identifies Exhibit 2 to his affidavit as an excerpt from the Opponent’s product database listing “some” of these products, which he attests have been sold through the Opponent’s Shoppers Drug Mart stores and certain Loblaw stores in Canada. The listing includes dollar and unit sales figures for each of the listed products for the period January 1, 2008 through November 2015.

[15] At paragraph 7, Mr. Dean provides “annual total values of such sales made of LIFE-branded products during the period 1991-2000”, ranging from \$94 million in 1991 to \$258 million in 2000. He also provides “total dollar value and units of such sales made of LIFE-branded products in the years 2006-2015”, ranging from \$285 million and 84 million units in 2006 to over \$558 million and over 136 million units in 2012.

[16] Exhibits 3 through 9 show sample labels and packaging for a variety of LIFE BRAND-branded products. In particular, Exhibits 6 and 7 show a variety of nutritional supplement and pharmaceutical products bearing LIFE BRAND marks, corresponding with the Opponent’s hair care products, cosmetic products, tooth and mouth care products, body care products and other personal care products, food products, beverage products, nutritional supplement products,

pharmaceutical products, baby care products and a wide assortment of other products. For example, the first eight pages of Exhibit 7 show the packaging for a variety of LIFE BRAND-branded cough & cold remedy products, bearing the LIFE BRAND design mark (TMA642,404). Although Mr. Dean does not correlate any of the depicted products with the listings in Exhibit 2, I note that the “LB Sales Report (2009 and 2010)” included as part of the exhibit lists over 100 LIFE BRAND “Cough & Cold” products with their corresponding sales and unit data.

[17] Exhibits 10 through 15 relate to the extensive advertising of the Opponent’s LIFE-branded products and drugstore services, including flyers, newspaper inserts, print advertisements and television commercials. Mr. Dean attests that total advertising expenditures for LIFE-branded products between 2008 and 2015 was in excess of \$56 million.

Applicant’s Evidence – Affidavit of AKM Hai

[18] At the outset, I note that the Applicant’s counter statement is lengthy and includes a mix of argument and unsupported allegations of fact, such as references to third party trademarks and market research surveys. To the extent that such matter has not been reflected in the Applicant’s evidence of record, I have not had regard to it.

[19] In his affidavit, Mr. Hai identifies himself as a research scientist who decided to develop his own products based on the idea that “Quality of Life is based on Science”. He explains that the term MOMA is derived from a combination of “molecular and material science”, and that the Mark is further derived from the slogan “MOMA at LIFE”, with the “concept/idea to deliver MOMALIFE goods and services for quality of life” (para 7).

[20] Mr. Hai acknowledges that the Opponent’s evidence shows a large number of products marketed in Canada in association with the LIFE BRAND family of trade-marks since 1956 (para 9). He also acknowledges the Opponent’s large expenditures on related advertising (para 10).

[21] At paragraph 11 of his affidavit, Mr. Hai identifies the following ten third-party registered trade-marks that incorporate “LIFE” as an element, all of which are registered for goods similar to the ones at issue: HERBALIFE (TMA292,393), HERBALIFE & Design (TMA827,005), HERBALIFE & Design (TMA926,341), RENEW LIFE (TMA910,067), NU-

LIFE (TMA864,284), NUTRALIFE & Design (TMA915,730), GREENLIFE (TMA465,321), PURITY LIFE HEALTH PRODUCTS LIMITED & Design (TMA386,272), HEALTHYLIFE & Design (TMA573,792), and VITALIFE (TMA212,635). Two of these marks are no longer registered and three of these registrations are owned by the same entity.

[22] Attached as Exhibit 3 to his affidavit, Mr. Hai provides printouts from the following third-party websites (para 14):

- *www.herbalife.com*, advertising a HERBALIFE meal replacement/protein supplement product;
- *www.goherbalife.com*, advertising various HERBALIFE nutritional supplement products;
- *Nulifevitamins.com*, advertising various NU-LIFE multivitamin products;
- *www.renewlife.ca*, advertising various RENEW LIFE probiotic products;
- *ca.iherb.com/NutraLife*, advertising various NutraLife dietary supplements; and
- *www.vitalife.com*, advertising various protein supplement products.

[23] Although two of these are “.ca” websites, there is no indication whether any of the other websites have ever been accessed by Canadians at any time.

[24] Mr. Hai’s affidavit otherwise relates to his marketing plans, including confirmation that he has obtained “pre-marketing authorization” from Health Canada for sales and distribution of certain MOMALIFE products (para 12). Attached as Exhibit 4 to his affidavit are “under construction” pages from his website, *www.momalife.ca*, as well as what appears to be sample graphics for advertising or product labelling of MOMALIFE products (para 14(ii)).

REPRESENTATIONS OF THE PARTIES

[25] As noted above, the Opponent filed no written representations.

[26] In its representations, the Applicant does not challenge the Opponent’s evidence of use of its LIFE BRAND marks in association with its numerous goods and services. The Applicant

maintains, however, that there is no likelihood of confusion between the Mark and the Opponent's registered trade-marks for the following reasons:

- MOMA is the abbreviated form of "MOLESCI & MATESCI" (*i.e.*, molecular science and material science);
- "life" is a generic word and cannot be appropriated by one person or company for their exclusive use, since this would give them an unfair advantage over competitors in the same trade;
- MOMALIFE is as distinctive and different as other trademarks incorporating the word "life", such as HERBALIFE (TMA292,393), RENEW LIFE (TMA910,067), NU-LIFE (TMA864,284), VITALIFE (TMA88,224), HEALTHYLIFE (TMA573,792), PURITY LIFE (TMA386,272), BIO-LIFE (TMA715,303), TREE OF LIFE (TMA718,384) and GOOD FOR LIFE (TMA702,702);
- As other variants of LIFE marks exist, the Opponent has no legal ground to oppose the subject application;
- MOMALIFE is clearly distinct and can easily be distinguished from the variants of the LIFE and LIFE BRAND trade-marks.

[27] The Applicant also submits that the application does, in fact, comply with section 30 of the Act because "the goods proposed in association with the MOMALIFE trademark are in [a] sales and distribution state" (para 7).

GROUNDS OF OPPOSITION

Non-compliance with section 30(e) of the Act

[28] The Opponent has pleaded that the application does not comply with sections 38(2)(a) and 30(e) of the Act because as of the filing date of the application, the Applicant did not intend to use the Mark in Canada in association with the applied-for goods.

[29] In the case of a proposed trade-mark, section 30(e) of the Act requires that the applicant include a statement that “the applicant, by itself or through a licensee, or by itself and through a licensee, intends to use the trade-mark in Canada”. The subject application includes such a statement by the Applicant.

[30] There is no evidence of record to suggest that the Mark was either used prior to the filing date or that the Applicant lacked the intention to use the Mark. Accordingly, the Opponent has failed to meet its evidential burden and I dismiss the ground of opposition based on non-compliance with section 30(e) of the Act.

Non-compliance with section 30(i) of the Act

[31] The Opponent has pleaded that the application does not comply with paragraphs 38(2)(a) and 30(i) of the Act because the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with all of the goods identified in the application in view of the prior adoption, use, making known and advertisement of the Opponent’s identified marks and family of marks and sections 19, 20 and 22 of the Act. In particular, the Opponent pleads that use of the Mark i) will infringe the Opponent’s exclusive rights in its LIFE family of trade-marks contrary to section 19 of the Act, ii) will be deemed to infringe the Opponent’s exclusive rights in such marks contrary to section 20 of the Act, and iii) will depreciate the value of goodwill existing in such marks contrary to section 22 of the Act.

[32] Section 30(i) of the Act only requires a statement by the applicant that it “is satisfied that he is entitled to use the trade-mark in Canada in association with the goods or services described in the application.” The subject application includes such a statement by the Applicant. Where an applicant has provided this statement, a section 30(i) ground of opposition should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. There is neither allegation nor evidence of that nature in the file.

[33] Rather, the Opponent pleads that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in view of the prior adoption, use, making known and advertisement of the Opponent’s family of marks and sections 19, 20 and 22 of the Act. I will

begin by noting that mere knowledge of the existence of the Opponent's marks does not in and of itself support an allegation that the Applicant could not have been satisfied of its entitlement to use the Mark [*Woot Inc v WootRestaurants Inc Les Restaurants Woot Inc*, 2012 TMOB 197].

[34] Further, it has not been established that grounds of opposition based on sections 19, 20 or 22 of the Act in combination with section 30(i) are valid grounds [see *Euromed Restaurant Ltd v Trilogy Properties Corp*, 2012 TMOB 19; *Player's Company Inc v Edward Roundpoint*, 2013 TMOB 149; *MapQuest, Inc v The Lodging Company Reservations Ltd*, 2014 TMOB 113; and *Advance Magazine Publishers Inc v MacRae*, 2016 TMOB 27]. In any event, in the present case, the Mark is based on proposed use and there is no evidence of use of the Mark. Absent evidence of sales, distribution or advertisement of goods in association with the Mark in the record, there cannot be any infringement of the Opponent's marks, nor any evidence supporting a likelihood of depreciation of goodwill.



[35] Accordingly, I dismiss the ground of opposition based on non-compliance with section 30(i) of the Act.

Non-registrability – section 12(1)(d)

[36] The Opponent has pleaded that the Mark is not registrable pursuant to section 12(1)(d) of the Act because it is confusing with one or more of the Opponent's registered trade-marks.

[37] The Opponent has filed copies of its 33 registrations as part of its evidence and I have exercised my discretion to check the register to confirm that each one is extant [per *Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 40 (TMOB)]. The Opponent has therefore met its initial burden with respect to this ground.

[38] I will assess the likelihood of confusion between the Mark and the Opponent's five LIFE BRAND trade-marks reproduced in the table below, as I consider such marks to represent the Opponent's strongest case because they are more similar to the Mark than the Opponent's other marks and are for overlapping or related goods and services. If confusion is not likely between any of these marks of the Opponent and the Mark, then confusion will not be likely between the Applicant's Mark and any of the Opponent's other registered marks.

Registration	Trademark	Goods/Services	Use Date
TMA192,911	LIFE BRAND	Pharmaceutical Preparations	1946
TMA204,542	LIFE BRAND	(1) Pharmaceuticals comprising analgesics, sedatives, cough and cold remedies, dermatological preparations, liniments, laxatives, antacids, antiseptics, antibiotics, ointments, and tonics; medicinal minerals; vitamins; salt substitutes, and sugar substitutes. ...	(1) 1966 ...
TMA283,502	LIFE BRAND & Design 	(1) Pharmaceuticals comprising analgesics, sedatives, cough and cold remedies, dermatological preparations, liniments, laxatives, antacids, antiseptics, antibiotics, ointments, and tonics; medicinal minerals; vitamins; salt substitutes, and sugar substitutes. ...	(1) 1977 ...
TMA457,618	LIFE BRAND	(1) ... throat lozenges and sprays; cough and cold capsules, cough and cold powders, cough and cold with codeine, nasal sprays, antihistamines; antacids and anti-nauseant remedies, laxatives, anti-diarrhoeal liquids; multi-vitamins and vitamins in all forms, mineral supplements, calcium supplements, health food supplements; namely brewer's yeast, calcium and magnesium, garlic and parsley, garlic capsules, odourless garlic oil capsules, gelatin capsules, ginseng capsules, lecithin, oatbran fibre and wheat germ capsules; ...	(1) 1993 ...
TMA642,404	LIFE BRAND Design 	(1) Pharmaceutical preparations namely analgesics, sedatives, cough and cold remedies, dermatological preparations, liniments, laxatives, antacids, antiseptics, antibiotics, ointments, and tonics; suppositories; throat lozenges and sprays, cold and cough capsules, cough and cold powders, nasal sprays, antihistamines, anti-	May 13, 2005

		nauseant remedies, anti-diarrhoeal liquids, stool softeners; acetaminophen, ibuprofen, coated ASA; dairy digestive aids; antacids. ... 3) Medicinal minerals; vitamins; multi-vitamins and vitamins in all forms, mineral supplements, calcium supplements, health food supplements, namely brewer's yeast, zinc lozenges, calcium and magnesium, calcium carbonate, beta carbonate, garlic and parsley, garlic capsules, odourless garlic capsules, gelatin capsules, ginseng capsules, glucosamine sulphate, lecithin, oat bran fibre, alfalfa leaf tablets, St. John's Wort, evening primrose oil, wheat germ capsules, horse chestnut, salt substitutes, and sugar substitutes; salmon oil, selenium, Echinacea; ginkgo biloba, grape seed; herbal laxative, herbal diuretic, herbal insomnia; herbal nerve; valerian; Kava kava; cayenne; royal jelly; saw palmetto. ... (1) Drugstore services.	
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[39] As the Opponent's evidentiary burden has been satisfied, the Applicant must establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and any of these registered trade-marks.

Test for Confusion

[40] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[41] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the

nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These factors need not be attributed equal weight [see *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, 49 CPR (4th) 321 and *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361].

Section 6(5)(a) – the inherent distinctiveness of the trade-marks and the extent to which they have become known

[42] In this case, the dominant feature of each of the Opponent’s aforementioned five LIFE BRAND trade-marks is the ordinary dictionary word “life”. As each of these marks are therefore somewhat suggestive that the Opponent’s goods are life sustaining or life prolonging, I do not consider any of these marks to be inherently strong.

[43] The Mark, on the other hand, is a coined word. Although the Applicant has submitted that MOMA is the abbreviated form of “MOLESCI & MATESCI” (*i.e.* molecular science and material science), I do not find that the average consumer would be aware of this intended meaning. Therefore, in view that the Mark has no meaning or suggestion in relation to the applied for goods, I consider it to possess a fair degree of inherent distinctiveness.

[44] With respect to the extent to which the parties’ marks have become known, in view of the Opponent’s extensive evidence of use of its LIFE BRAND marks in association with many of the Opponent’s goods and services, I consider the Opponent’s LIFE BRAND trade-marks to have become well known in Canada and have significant acquired distinctiveness.

[45] The Mark, on the other hand, was applied for on the basis of proposed use. Although the Applicant has provided evidence of its marketing plans, this evidence does not show that the Mark has acquired any reputation in Canada, and there is no evidence that the Applicant has subsequently used the Mark in Canada. I therefore find that the Mark has not become known at all in Canada.

Section 6(5)(b) – the length of time the trade-marks have been in use

[46] As discussed above, there is extensive evidence of use of the Opponent’s marks, yet no evidence of use of the Mark as of the date of this decision. Accordingly, this factor favours the Opponent.

Section 6(5)(c) – the nature of the goods or business; section 6(5)(d) – the nature of the trade

[47] Clearly, there is direct overlap of the applied-for goods and the Opponent’s registered goods and services. Presumably, the parties’ channels of trade would also overlap. Accordingly, these factors also favour the Opponent.

Section 6(5)(e) – the degree of resemblance

[48] In *Masterpiece*, the Supreme Court stated that the degree of resemblance between the marks is often likely to have the greatest effect on the confusion analysis [see also *Beverley Bedding & Upholstery Co v Regal Bedding & Upholstery Ltd* (1980), 47 CPR (2d) 145 (FCTD) at 149, affirmed 60 CPR (2d) 70]. While the Court also observed that, for the purpose of distinctiveness, the first word of a trade-mark may be the most important [see *Conde Nast Publications Inc v Union des éditions modernes* (1979), 46 CPR (2d) 183 (FCTD)], it opined that the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trade-mark that is particularly striking or unique.

[49] In the present case, neither the word LIFE nor the word BRAND in any of the Opponent’s marks are particularly striking or unique. As a result, I accept that the dominant feature of each of the Opponent’s marks would be their first portion, *i.e.* the word LIFE.

[50] Although the Applicant’s mark includes the word LIFE as its second component, the MOMA portion of the Mark is both the first portion and the most striking or unique aspect of it. As the dominant features of the parties’ marks are different, I only find there to be a small degree of resemblance between the marks in appearance and sound. The ideas suggested by the marks are also different as the Mark is a coined word that does not suggest any idea in particular whereas the Opponent’s LIFE BRAND marks suggest that its goods are life sustaining or life prolonging.

[51] Accordingly, I find that this important factor favours the Applicant.

Further Surrounding Circumstance - State of the Register

[52] The Applicant has introduced state of the register evidence by way of Mr. Hai's affidavit. Such evidence has been held to be relevant only insofar as one can draw inferences from it about the state of the marketplace [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); and *Welch Foods Inc v Del Monte Corp* (1992), 44 CPR (3d) 205 (FCTD)]. Inferences about the state of the marketplace can only be drawn where a large number of relevant registrations have been located [*Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)].

[53] In my view, the existence of eight registrations in good standing, six of which belong to third parties, is insufficient to allow for inferences to be made about the state of the marketplace. Although the Applicant has also filed evidence of some of these third party marks on website printouts advertising various health related products, in the absence of use of such marks in Canada, I cannot draw an inference about the state of the marketplace.

[54] This factor therefore does not assist the Applicant.

Conclusion re: Likelihood of Confusion

[55] Section 6(2) is not concerned with confusion between the marks themselves, but rather confusion as to the source of the goods or services. In this case, the issue to be decided is whether a consumer who has a general and not precise recollection of the Opponent's LIFE BRAND marks will, upon seeing the Mark, be likely to think that the parties' goods or services share a common source.

[56] In considering this issue, I have regard to the decision *Imasco Retail Inc v Purity Life Health Products Ltd* (1990), 34 CPR (3d) 113 (TMOB), where the Registrar considered the issue of confusion between LIFE BRAND trade-marks and the trade-mark PURITY LIFE HEALTH PRODUCTS LIMITED & Design:

Further, to the extent that the trade marks at issue generally suggest the idea of health, I do not consider that any party should be entitled to a monopoly in respect of such an idea in relation to a trade mark applied to health care products. [at 121]

...With respect to the degree of resemblance between the trade-marks at issue, I consider that I am bound by the decision of Denault J. in the Sum-Spec case, referred to above, the learned trial judge commenting as follows when considering the degree of resemblance between the trade-marks LIFE BRAND and PURE LIFE & Design, at p. 14:

Viewed in their totalities the competing trade marks and designs are very dissimilar in appearance. Their sound is quite different as well, especially in the first words which are altogether different in sound.

[57] Having regard to the above, and, in particular, to the dissimilarity in appearance, sounding and ideas suggested by the trade-marks when considered as a matter of immediate impression and imperfect recollection, and notwithstanding the extensive reputation of the Opponent's LIFE BRAND trade-marks in its field, I find that the Applicant has satisfied its burden to show that there is no reasonable likelihood of confusion between the parties' marks.

[58] The section 12(1)(d) ground of opposition is therefore not successful.

REMAINING GROUNDS OF OPPOSITION

[59] I am satisfied that the Opponent has met its evidential burden under both the section 16(3)(a) and non-distinctiveness grounds of opposition. Like the section 12(1)(d) ground, these grounds of opposition turn on a determination of the issue of the likelihood of confusion between the Mark and the Opponent's marks.

[60] As noted above, the material dates for assessing the likelihood of confusion in respect of the non-entitlement and non-distinctiveness grounds are, respectively, the Applicant's filing date and the date of opposition. In my view, the differences in material dates do not have any significant impact on the determination of the issue of confusion between the trade-marks of the parties. Thus, my finding above that the trademarks are not likely to be confused applies to these grounds of opposition which are also not successful.




DISPOSITION

[61] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

Cindy Folz
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Opponent's LIFE Trade-marks

Registration Number	Trade-mark
TMA192,911	LIFE BRAND
TMA204,542	LIFE BRAND
TMA207,841	LIFEPRIN
TMA210,536	THE LIFE CENTRE
TMA257,394	LIFE BRAND
TMA260,641	LIFECOLOR
TMA283,502	LIFE BRAND & Design 
TMA385,507	LIFE BRAND BEAR Design 
TMA387,886	YOU GET MORE OUT OF LIFE
TMA457,618	LIFE BRAND
TMA460,064	LIFE BRAND
TMA463,636	LIFE BRAND
TMA466,009	LIFE BRAND BOTANICALS
TMA467,347	LIFE BRAND
TMA469,476	LIFE BRAND NATURALS
TMA478,874	LIFE BRAND NATURALS
TMA481,300	LIFE BRAND NATURELS
TMA499,221	LIFE BRAND ESSENTIALS
TMA506,728	LIFE FOR KIDS & Design 
TMA642,404	LIFE BRAND Design

	
TMA679,933	LIFE FOUNDATION & Design 
TMA702,702	GOOD FOR LIFE
TMA704,366	LIFE BRAND NATURAL REMEDIES
TMA715,303	BIO-LIFE
TMA718,384	TREE OF LIFE
TMA718,385	TREE OF LIFE & Design 
TMA719,734	LIFE BRAND EXOTICS
TMA720,190	LIFE BRAND MEDITERRANEAN
TMA721,313	LIFE BRAND NATUREL
TMA722,261	LIFE BRAND ADVANCED MOISTURE THERAPY
TMA725,528	MY LIFE MY STORE
TMA823,939	LIFE BRAND
TMA854,195	BABY LIFE BRAND

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENTS OF RECORD

Torys LLP

For the Opponent

No agent of record

For the Applicant